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Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1597

A. L. MASSEY, ET AL., Petitioners

versus

GULF OIL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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GULF OIL CORPORATION

PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully seek a Writ of Certiorari to review the judgment and denial of petition for rehearing of the United States Court of Appeals for the Fifth Circuit in this cause.

OPINIONS BELOW

Fifth Circuit - The Opinion of the Court of Appeals affirming the District Court is reported in 508 F2d 92 and for

the convenience of this Court is reproduced in Appendix B to this Petition.

District Court - The Opinion of the District Court for the Southern District of Mississippi granting a new trial was not reported, but is set forth in Appendix A to this Petition.

JURISDICTION

The Judgment of the Court of Appeals affirming the District Court's granting a new trial was entered February 17, 1975. (Appendix C). A petition for rehearing, timely filed, was denied on March 21, 1975. This Court has jurisdiction to review the Judgment of the Court of Appeals by Writ of Certiorari under 28 U.S. Code, § 1254(1).

QUESTIONS PRESENTED

1. When can the Court invade the Seventh Amendment province of the jury

to try questions of fact?

2. Is the amount of oil and gas a prudent operator would recover in a unitized oil and gas field a factual question for the jury and not for the Court to determine?

3. Is the weight, thrust and verity of the expert opinion testimony of a qualified petroleum engineer on the prudence or lack thereof by the operator of an oil and gas field to be decided by the jury instead of the Court?

STATEMENT

This is an action by a family of royalty owners for a breach of contract against the operator of an oil and gas unitization agreement. After three (3) years of extensive discovery, a jury trial ended with a verdict of $265,876.00 for the royalty owners. The District

Judge in the Southern District of Mississippi set aside the entire jury verdict on the grounds the jury accepted the testimony of the royalty owners' expert petroleum engineer and that testimony impelled, according to the Court, an "unfair and unjust award." The Court contended a $265,876.00 verdict was "excessive" because the royalty owners received only $125,000.00 during the period in question and such an award would make the operator who owned 7/8ths of the minerals damaged seven times the royalty owner.

Because the royalty owners felt the Court was in clear error and their whole case depended on this testimony from this witness, an appeal was taken to the Court of Appeals.

On appeal that Court would not reinstate the jury verdict and said that the royalty owners' petroleum engineer could not have the opinion that the field should recover enough oil under a prudent operation to pay the royalty owners based on a 40% recovery factor (recovering 40% of the oil in the ground and leaving 60% to never be recovered). The Court quoted the opinion of one of the opposition's witnesses indicating that it was impressed by the fact that Gulf's actual recovery factors ranged from .3% to 75% in different reservoirs in the field and that Gulf used a 40% recovery factor for calculating percentages of participation (ownership) and these percentages of participation would not have changed if a 100% recovery factor was used. The Court contended the royalty owners' witness

could not have used that 40% recovery factor for determining a prudent operator's recovery for the field.

Because these contentions of both the District Court and the Court of Appeals are in error and deprive the appellants of a valid jury verdict in their favor or for that matter any verdict in their favor, in violation of their Constitutional rights and the sanctity of the jury's domain, this appeal was taken.

REASONS FOR GRANTING THE WRIT

The District and Appeals Courts were clearly in error prejudicial to Petitioners, depriving them of their constitutional right under the Seventh Amendment to have a jury be the ultimate trier of the facts rather than the Court. In supplanting its decision on the facts

for the jury's, each Court based its reason for negating the verdict on erroneous premises.

The District Court erred in relating the amount of royalty actually paid in the damage period under what the jury (which specified in interrogatories six distinct breaches of contract) called an imprudent operation to the amount that should have been paid under a prudent operation. There can be no relation except that the greater the imprudence the greater the damages. Secondly, the working interest operator (who pays all the costs of operations - including secondary recovery out of his part) could not be damaged seven times more than the royalty owner (whose interest is not charged with any costs of extraction). Less than 20% of the oil

in place was recovered from the field instead of 40% because secondary recovery would have to be paid out of the operator's part and such investment did not meet this particular operator's individual investment policy which required a rate of return of income of four times the expenditures. Their interests therefore are in sharp conflict. These two grave errors in the District Court's opinion show that at the time of granting the new trial that Court had lost the freshness afforded by a trial and the awareness of all of the complex issues and facts of the case.

The same problem befell the Appeals Court. The Court of Appeals held that the royalty owners' petroleum engineer, Mr. Rodgers, could not use 40% as the prudent operator recovery factor of

in-place oil, because he was getting it from one of Gulf's calculations and figures which were used for percentage of participation (what it called POP) and that POP had no relation to what the actual recovery was or should have been. This, however, is not the case.

We agree that Gulf used a 40% recovery factor for each reservoir and if they had used a different figure, say 100%, according to their method, Gulf's POP calculations would have remained the same. But first it was imprudent to use it in that way if in fact the 38 different reservoirs had different recovery factors ranging from .3% to 75% as Gulf testified. The owner under the .3% reservoir was greatly benefited by lumping (unitizing) his reservoir in with the 75% reservoir. But what were

the consequences for the other owner?

Merely because Gulf actually recovered only .3% from a reservoir does not mean a prudent operator with a different internal rate of return requirement would not have recovered 40% of the oil from that reservoir. Because the injection of any recovery figure in Gulf's POP does not change Gulf's figures, a prudent operator in this field of 38 varied and distinct reservoirs may still be committed to compensate with production any inequities from POP or to make the POP equitable. Further, because Gulf used 40% for POP does not mean the royalty owners' engineer used it for the same reason or for the same purpose. He was fully aware of what Gulf used it for and knew he was using it for what a prudent operator under the circumstances

of this case would have recovered for the royalty owners.

Even the Court of Appeals recognized the 40% figure was not arbitrary when it quoted Gulf's own petroleum engineer:

> "That it is common practice to assume 20% recovery, which is about average, that Gulf had studies which said water flooding [which it did not do] would be productive in this field, in which case the practice was to assume an additional 20% recovery."

All the petitioners request is that their interest receive the average primary recovery of 20% and the average water flooding recovery of an additional 20% for the common (and not arbitrary) 40% recovery.

Petitioners' expert witness only required Gulf, to be considered prudent, to recover the usual and average 40%, rather than an out-of-the-ordinary

percent of recovery. Gulf's actual recovery, which was stressed in both Courts' opinions, turns out to be substantially less than 20% and bears no relation to what a prudent operator would recover. The greater the imprudence, the smaller the actual recovery, the greater the damages.

But the District and Appeals Courts would not let the Petitioners' expert witness even hold Gulf to an average recovery standard. If there were some question as to the witness's qualifications, the extent of his study or an obvious error in his testimony, then we would agree the Court can challenge these elements of his testimony. But, merely to say that Gulf's witnesses are of the opinion that a 40% recovery is inconsequential and arbitrary in the

calculations of percentages of participation, does not prevent our use of 40% recovery from Gulf's sand volume computations to calculate damages. Must we use 45% or 38% because Gulf has a monopoly on the 40% figure? We agree that this is getting absurd but the royalty owners' witness was not just using 40% because Gulf did. He agrees with Gulf's petroleum engineer that the usual recovery is 20% for primary recovery and then add an additional 20% for secondary recovery or other pressure maintenance operations. He agrees that the field under Gulf has produced less than 20% and since no secondary recovery or successful pressure maintenance operations have been instituted, the other 20% to be recovered by secondary recovery, (which a prudent operator would

have done,) is what the royalty owners have been damaged. If, in fact, their extra 20% had been recovered by simply instituting secondary recovery, then the "unfair and unjust award" of the jury would have been exactly what the royalty owners would have additionally received during the damage period.

If you start removing isolated parts of the presentation without the circumspection of the full presentation fresh in your mind, it is easy to miss the thrust of the presentation and what the objective was. POP taken out of the specific and implied fiduciary obligations of the unitization agreement can be a cold, indifferent principle. But taken in the context of the prudent operator requirements "to promote conservation," "to enable the maximum

efficient recovery," "for the development of the entirety . . . in order efficiently and economically to produce . . . and . . . to enable Operating Parties fairly and equitably to make the final recalculation of the percentage of participation," it is hardly an indifferent principle.

It then becomes the duty of the prudent operator to use a proper recovery factor for the final POP for each reservoir after full development, including secondary recovery; or failing this to at least produce enough oil out of the field to compensate the loss to the owners of the 75% recovery reservoir if he is not to share in this .3% owner's part because secondary recovery was not implemented. This was the thrust of the royalty owners' position.

The royalty owners exposed in the trial the drilling costs savings of non-competitive drilling to the operator, the operator's individual development investment constraints of not making an investment of money in development without being certain it would return to the operator revenue four times greater than the investment, and finally that no secondary recovery and other pressure maintenance was instituted in the field even though that was the purpose of unitization.

Also by withdrawing only an opinion of Gulf's petroleum engineer that 40% was arbitrarily used by Gulf and dropping the investigation into the thrust of the royalty owners' testimony, many other important considerations to the whole case are lost. The actual operation of

a prudent operator can not be reconstructed because of poor records, commingling of production of each pool with other pools, and the failure to develop secondary recovery operation before the production of the reservoirs made such operations ineffective has prevented such reconstruction. Therefore, what a prudent operator would have recovered and paid to the royalty owners can only be constructed using Gulf's imprudent calculations. With nothing to show to the contrary, Mr. Rodgers' opinion that the reservoirs should and could have produced, under a prudent operator, enough oil to pay the royalty owners the amount of a 40% recovery from each reservoir is the best probative evidence that could be offered.

The Court said that Gulf used the

mathematical calculations only to pay royalty and other owners and not for a prudent operation. But is that not the same use Mr. Rodgers made of the calculations? He simply added that had Gulf been prudent in its operations, these calculations would have reflected that prudence.

CONCLUSION

The only contest Gulf or the Court makes of Mr. Rodger's damages is that he applied the same recovery factor of 40% to the mathematical calculations Gulf used. Gulf used 40% arbitrarily but that does not mean Mr. Rodgers used it arbitrarily also. Mr. Rodgers submitted extensive expert testimony before reaching his conclusion and none of his testimony was arbitrary. He offered all of his testimony and exhibits

to cross-examination but no objection was made to the exhibits and no questions were asked of him. This Court has held that in cases such as this, where scientific opinions are the best evidence, the Court should avoid disturbing the original decisions founded thereon. Federal Power Com'n v. Florida Power & Light Co., 404 US 453, 30 L.Ed. 2d 600, 92 S.Ct. 637 (1972); United States ex rel. Chapman v. Federal Power Com'n., 191 F.2d 796, 808 (1951) aff'd, 345 US 153, 97 L.Ed. 918, 73 S.Ct. 609 (1953).

Additionally, the Petitioners' right to have a jury decide their questions of scientific conclusions instead of the Court is specifically provided for in the Seventh Amendment to the United States Constitution:

"[i]n suits at common law, where

> the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

This Court has preserved and extended that right throughout our history. Parsons v. Bedford, 3 Pet. 433, 7 L.Ed. 732 (1830); Curtis v. Loether, 415 US 189, 39 L.Ed. 2d 260, 94 S.Ct. 1005, 1974.

The real danger of letting the Court substitute its judgment for that of the jury on a question of fact is classically demonstrated in this case. We have gone to great lengths to preserve the integrity of our jury system and we need to expend our limited but valuable energies for its preservation rather than for its defeat.

Respectfully submitted

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MICHAEL R. EUBANKS

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CERTIFICATE

I hereby certify that I have this day served a true and correct copy of the above and foregoing Petition for a Writ of Certiorari to Mr. C. Denton Gibbes, P. O. Box 2008, Laurel, Mississippi, 39440, Mr. James A. Boone, P. O. Box 1269, Jackson, Mississippi, 39205, and Mr. William G. Duck, Gulf Oil Corporation, Saratoga Building, New Orleans, Louisiana, 70113, attorneys for the Defendant in this action, by mailing the same in the United States Mail, postage prepaid, to the respective address of each of said attorneys.

DATED this the 18th day of June, 1975.

Michael R. Eubanks

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NUMBER 4899

A. L. MASSEY, et al. Plaintiff

V.

GULF OIL CORPORATION Defendant

The plaintiffs own one-fourth of the one-eighth royalty interest in the minerals under 120 acres of land in Jones County. On June 1, 1956 the plaintiffs joined others in the execution of a Unitization Agreement embracing the Soso Oil and Gas Field in Jasper, Jones and Smith Counties, Mississippi. The defendant was the lessee under a standard form oil and gas lease on plaintiffs' said land. The defendant was chosen by the operating parties to conduct the operation of this Soso Field Unit under the provisions of said Unitization Agreement. There was prepared by the study committee of this group a determination of percentage of participation dated July 3, 1956.

The plaintiffs instituted this suit against the defendant for damages for breach of this Unitization Agreement on the grounds, among others, that defendant had not developed the field under the Pool Agreement in the best interest of these plaintiffs as royalty owners, and that they had not established the

outer limits of the field and had not exercised their expertise in the business of exploring the field and making the best use of the field to the best advantage of the royalty owners. In the meantime, the defendant had enjoyed very large revenues from its operation of the field as an operating party. A detailed review of the evidence in this technical suit involving vast records would seem to serve no useful purpose at this time.

The case was tried before a jury which returned a verdict for the plaintiffs in the principal amount of $265,876.00 along with answers to interrogatories propounded by the Court under the rules. These interrogatories were answered consistently with each other and consistently with the general verdict.

The defendant has moved for a judgment notwithstanding the verdict, and alternatively for a new trial. These motions present different questions and each must be decided upon different principles under Montgomery Ward & Co. v. Duncan, 61 S.Ct. 189.

The parties are poles apart on their contentions as to the facts as well as to the controlling principles of law. The relationship between the plaintiffs and the defendant is one of trust and confidence and must be so respected.[1]

[1] Palmer v. Chamberlin, (5CA) 191 F.2d
(Footnote continued on next page)

Under the terms and conditions of this Unitization Agreement, the defendant was employed to develop this Soso Field for the best interest of these plaintiffs and all other parties in interest by the exercise of their expert knowledge and experience in this line of endeavor with the exercise of reasonable prudence and care in the performance of such duties. The motion for a judgment notwithstanding the verdict of the jury must be treated and acted upon by the same standards as a motion for a directed verdict. Such motions for a directed verdict during the trial were overruled. All evidence on behalf of the plaintiffs with reasonable inferences in their favor must be indulged by the Court in favor of the adversary in its consideration of this motion. It suffices to say that there is sufficient evidence in this record before the Court in this case to withstand such a motion. These plaintiffs contend with substantial factual support from expert witnesses that this Unitization Agreement has been breached and violated by the

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Footnote 1 Continued -
532, 538 holds: "Likewise, 'An agent is a fiduciary with respect to the matters within the scope of his agency.' 2 Am. Juris. Agency Sec. 252, citing inter alia Sim v. Edenborn, 242 U.S. 131, 37 S.Ct. 36, 61 L.Ed. 199; Grumley v. Webb, 44 Mo. 444, 100 Am.Dec. 304, and Amer. Law Institute Restatement Agency Sec. 13."

defendant in several material respects unnecessary to enumerate. It cannot be convincingly contended on this record that the defendant's motion for a judgment notwithstanding the verdict of the jury has merit therein and such motion will be overruled.

The motion for a new trial presents a more difficult question. The jury in this case took Plaintiffs' Exhibit 46 which itemized plaintiffs' concept of the damages in the aggregate amount of $531,752.00 and divided that figure by one-half and returned such verdict with its consistent answers all in the negative to the accompanying interrogatories. This suit in its entirety is based upon expert testimony consisting of the opinions of geologists and engineers as to losses sustained by the plaintiffs from the breach of this Unitization Agreement. It is familiar learning that the trier of facts need not accept the opinion testimony of expert witnesses even though uncontradicted. In this case such testimony of the expert witnesses was based in larger part upon projections and estimates made by defendant of these minerals in place in Zone A and in Zone B which lie more than two miles under the surface of the earth. These plaintiffs owned only one-fourth of the one-eighth royalty interest in the minerals under this 120 acre tract of land. The defendant and others owned the remaining 31/32 interest in such minerals. This jury has thus found that these plaintiffs

as owners of a 1/32 interest in the minerals on this 120 acre tract of land have sustained damages from the loss of minerals not mined and in place in the amount of $265,876.00, plus earnings under the contract for the remainder of the period of the unitization. In other words the minerals under this entire tract of land in addition to all previously produced thereon are worth $8,508,032.00. By this standard by inflicting damages in said amount on these plaintiffs, the operators themselves have sustained damages on this 120 acre tract alone in the amount of $8,242,156.00. These damages in any such amount are so fantastic even though based on so-called "expert" testimony as to be incredible.

It is interesting to notice that for the six years prior to 1969 that these plaintiffs were paid royalties aggregating $102,474.48. In 1969 they were paid $11,935.29 and in 1970 they were paid $11,696.05. This is not a suit for the recovery of minerals in place, but is a suit for damages sustained by the plaintiffs on and before the date of the verdict in this case. Under this verdict the plaintiffs can bring additional suits until the expiration of this Unitization Agreement in the Soso Field. There is no credible evidence in this record to show that these plaintiffs have sustained, or will sustain any damages in such an unreasonable amount. This is a very large unitized field, said by one witness to be six

miles in length and two miles in width.

Obviously, this jury was honestly trying to base its verdict upon this Exhibit P-46 under the mistaken idea of its controlling force and effect. This Exhibit P-46 was introduced in evidence without objection being interposed thereto and was marked accordingly by instructions of the Court at transcript 117. This expert testimony does not impel such an unfair and unjust award. These damages awarded in this case are excessive and this verdict is vulnerable to the criticism that its enforcement would be an injustice to the defendant under the facts and circumstances in this case, and that the motion for a new trial should be sustained.

The motion for a judgment notwithstanding the verdict of the defendant will be overruled, but the motion of the defendant for a new trial will be sustained.

A judgment accordingly will be prepared and entered by the Court.

November 19, 1971.

s/ Harold Cox
UNITED STATES
DISTRICT JUDGE

A. L. MASSEY et al., Plaintiffs-Appellants,

v.

GULF OIL CORPORATION, Defendant-Appellee.

No. 72-3057.

United States Court of Appeals,
Fifth Circuit.

Feb. 17, 1975.

Holders of 1/32 nonparticipating royalty interest in Mississippi oil field who had entered into a unitization agreement brought action against oil company alleging breach of contractual obligations owed to them under agreement by oil company as designated operator of oil field. After first trial resulted in jury verdict for plaintiffs, the United States District Court for the Southern District of Mississippi, William Harold Cox, J., granted oil company's motion for new trial. The second trial resulted in jury verdict for defendant oil company, and plaintiffs appealed. The Court of Appeals, Godbold, Circuit Judge, held that where, at first trial, royalty owners' expert witness used 40% recovery factor which did not accurately represent percentage of oil recovery that should be obtained by prudent operator in the subject field in calculating royalty owners' alleged damages and where royalty owners' alternate approaches to assessment of damages did not support verdict, district judge did not abuse his discretion in granting defendant oil company's motion for new trial on ground that verdict was not supported by evidence of sufficient accuracy and reliability.

Affirmed.

1. Courts ⇐406.1(12)

Review of order granting new trial properly awaits entry of final judgment following the new trial.

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2. Courts ⇐406.5(21)

Ruling of district judge in either granting or denying motion for new trial is reviewable under abuse of discretion standard.

3. Courts ⇐406.1(11)

The review on appeal of an order granting motion for a new trial is somewhat broader than review of an order denying motion for a new trial.

4. Courts ⇐406.1(11)

The operative factors underlying review on appeal of a ruling on a motion for a new trial are: (1) deference to the trial judge who had the opportunity to observe witnesses and consider the evidence in the context of a live trial, (2) deference to the jury's determination of the weight of the evidence and quantum of damages, and (3) the constitutional allocation to juries of questions of fact.

5. Courts ⇐406.1(11)

Where a new trial is granted on the ground that the verdict is against the weight of the evidence, reviewing court will exercise a closer scrutiny than where the ground is that some undesirable or pernicious influence has intruded into the trial since in the former case the judge to an extent has substituted his judgment of facts and credibility of the witnesses for that of the jury.

6. Federal Civil Procedure ⇐2342

Where royalty owners' expert witness used 40% recovery factor which did not accurately represent percentage of oil recovery that should be obtained by prudent operator in the subject field in calculating royalty owners' alleged damages sought against designated operator of the field and where royalty owners' alternate approaches to assessment of damages did not support verdict, district judge did not abuse his discretion in granting defendant operator's motion for new trial on ground that verdict was not supported by evidence of sufficient accuracy and reliability.

Appeal from the United States District Court for the Southern District of Mississippi.

Before THORNBERRY, GODBOLD and CLARK, Circuit Judges.

GODBOLD, Circuit Judge:

This appeal follows a new trial granted by the District Judge. We review the correctness of the order granting that new trial and decide that it was not erroneous.

Plaintiffs own a 1/32 non-participating royalty interest in 122 acres of the Soso Oil Field in Mississippi. They and the other owners of royalty and operating interests in the Soso Field entered into a unitization agreement. This is an agreement under which royalty owners and operators of tracts in a field agree to combine or "pool" the tracts for operational purposes into a single unit to be operated in an integrated manner. See 1A Summers, Oil and Gas, § 104. The Soso Field had been in production several years before the unitization agreement was entered into. Contemporaneously all operating parties joined in an agreement designating Gulf as sole operator of the unit.

Plaintiffs sued Gulf for breach of the contractual obligations owed to them under the unitization agreement by Gulf as the designated operator. Stated briefly, plaintiffs claimed that Gulf "high graded" the unit by extracting only the oil most easily and least expensively available. The case was tried to a jury which found in answer to specific interrogatories that Gulf had failed in several different respects to carry out the obligations placed upon it by the unitization agreement. The jury returned a general verdict for the plaintiffs, assessing their damages at $265,876.

Gulf moved for judgment n. o. v. or for new trial. The trial judge denied the motion for judgment n. o. v. on the ground that there was "substantial factual support from expert witnesses that [the] Unitization Agreement has been breached and violated by the defendant in several material respects." He granted the motion for new trial and directed a new trial on all issues.

[1] In the second trial the jury found for the defendant Gulf. On this appeal plaintiffs do not challenge any part of the second trial but only the propriety of the order granting that trial. Review of the order properly awaited the entry of a final judgment following the new trial. 6A Moore's Federal Practice ¶ 59.15[1], at 59–273ff; 11 Federal Practice and Procedure (Wright & Miller Ed.) § 2818 at 115–116.

The District Judge set out in a written order his reasons for granting a new trial. Though stated in various ways, the heart of his order is that he considered that the evidence of plaintiffs' damages, as calculated by plaintiffs' expert witness and summarized in a single exhibit, lacked credibility. This conclusion was not directed at credibility in the sense of truth versus untruth but in the sense of the lack of accuracy of a complex mathematical computation; that is, the calculation of plaintiffs' damages, as made and summarized by plaintiffs' expert witness, was not supported by underlying evidence, with the result that the ultimate damage figure could not be accepted as accurate ("credible").[1] An additional fact noted by the judge was that the damages figure assessed by the jury was precisely one-half of the expert's ultimate (and insufficiently accurate) figure, which figure reached by the jury was otherwise unrelated to the evidence.

[2] In this circuit the ruling of a trial judge in either granting or denying a motion for a new trial is reviewable

1. Of course, credibility is usually for the jury and not the court, as is acceptance or rejection of uncontradicted expert testimony. We pretermit consideration of whether a trial judge can validly set aside a verdict and grant a new trial on the single ground that he does not accept as truthful a witness that the jury was entitled to believe, or rejects uncontradicted expert testimony that the jury was free to accept.

under an abuse of discretion standard.[2] United States for use of Weyerhaeuser Co. v. Bucon Construction Co., 430 F.2d 420 (CA5, 1970); Telfair v. Zim Israel Navigation Co., 428 F.2d 127 (CA5, 1970), cert. denied, 400 U.S. 1009, 91 S.Ct. 568, 27 L.Ed.2d 622 (1971); Willitt v. Purvis, 276 F.2d 129 (CA5, 1960); Marsh v. Illinois Central R. Co., 175 F.2d 498 (CA5, 1949). Although the trial judge's discretion is broad with respect to the granting of a new trial, the granting of a new trial constitutes reversible error under certain circumstances. *See* 6A Moore's Federal Practice ¶ 59.08[5], at 59–162–63.

[3–5] Our review of an order granting a motion for trial is somewhat broader than review of an order denying a motion for new trial. In Gorsalitz v. Olin Mathieson Chemical Corp., 429 F.2d 1033 (CA5, 1970), drawing at length from Taylor v. Washington Terminal Co., 133 U.S.App.D.C. 110, 409 F.2d 145 cert. denied, 396 U.S. 835, 90 S.Ct. 93, 24 L.Ed.2d 85 (1969), we pointed out that the operative factors underlying review of a ruling on a new trial motion are deference to the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record, deference to the jury's determination of weight of the evidence and quantum of damages, and the constitutional allocation to juries of questions of fact. We noted that where the judge denies the motion and leaves undisturbed the jury's determination, all factors press in the direction of leaving the trial judge's ruling undisturbed. But where the judge has granted a new trial, the factors oppose each other. Deference to the trial judge is subjected to opposing tensions of deference to the jury as the body to whom fact finding is constitutionally allocated and deference to the decision which the jury has reached pursuant to that authority. Furthermore, where a new trial is granted on the ground that the verdict is against the weight of the evidence,

2. The terminology is unfortunate. The phrase abuse of discretion has no pejorative content. It means to us no more than that the court has clearly erred. 6A Moore's Federal Practice ¶ 59.08[6], at p. 59–175.

we exercise closer scrutiny than where the ground is that some undesirable or pernicious influence has intruded into the trial, because to an extent the judge has substituted his judgment of the facts and credibility of witnesses for that of the jury. Thereby we protect the litigants' right to jury trial. O'Neil v. W. R. Grace & Company, 410 F.2d 908 (CA5, 1969).[3]

Thus we direct our close scrutiny to the predicate for the granting of a new trial, which in its ultimate thrust was the lack of accuracy of the expert's calculation as a basis upon which damages could be assessed. Plaintiffs' primary method for calculating damages was based upon data obtained from records which Gulf was required to and did maintain with respect to the unit. Under the unitization agreement it was necessary to establish a "percentage of participation" ("POP") for each tract in the unit on the basis of which the production from the unit was allocated to the respective tracts. The amount allocated to a tract would be, of course, distributed among the several parties interested in the tract (both operating parties and royalty owners) on the basis of their respective interests. Thus the POP was the critical factor for determining the return which each royalty owner received from the interest which he had put into the operating unit by joining in the unitization agreement.

An initial POP was calculated for each tract in Zone A of the unit (strata down to 12,000 feet) as of the date of execution of the unitization agreement in 1956. The POP of each tract was the proportion that the "evaluated acre feet" of sand under the tract bore to the aggregate "evaluated acre

3. To be distinguished are cases which have determined the propriety of a trial court's award of remittitur. This court has held that a trial judge's remittitur order will be reversed "only where the quantum of damages found by the jury was *clearly* within 'the maximum limit of a reasonable range.'" Gorsalitz v. Olin Mathieson Chemical Corp., 429 F.2d 1033, 1046 (CA5, 1970), quoting Taylor v. Washington Terminal Co., 409 F.2d 145 (CADC), cert. denied, 396 U.S. 835, 90 S.Ct. 93, 24 L.Ed.2d 85 (1969). We do not decide whether this "maximum recovery rule" applies to an order for a new trial. *See* United States v. 1160.96 Acres of Land, 432 F.2d 910 (CA5, 1970).

feet" of sand under all tracts. The agreement specifically recognized that operations would provide additional information which might require altering the initial POP's and provided for subsequent revisions of POP's which should take into consideration data obtained from drilling wells and all other available information regarding the extent of the sands. Gulf was obligated to recalculate POP's at six months' intervals over a period of 30 months. The last such recalculation, which would fall in mid-1969, was to be the final recalculation and, with exceptions not here relevant, it would govern for Zone A for the remainder of the life of the unitization agreement.

The arrangements with respect to Zone B (strata below 12,000 feet) were substantially the same, except that the initial POP's were to be established if and when exploration in Zone B resulted in production of oil in commercial quantities. Periodic recalculations of POP's were required, with the final recalculation, falling in 1968, to govern thereafter for Zone B.

[6] Plaintiffs introduced evidence of their damages calculated by an expert witness, Thomas M. Rogers, a petroleum engineer and lawyer and former employee of the law department of a large oil company. Rogers employed Gulf's data, utilized by it in making the final recalculation of the POP's for each tract, in 1959 for Zone A and in 1968 for Zone B. Pursuant to Mississippi regulatory procedures, the final POP's, when recalculated, were filed of record in each Mississippi county affected, and at the same time Gulf made public the data supporting the final recalculations, consisting for each zone of a large book of data. These books were introduced in evidence. They showed with respect to each tract the acre feet of pay sand. They showed that in making the final recalculations of POP's, Gulf had applied to this figure various factors such as the porosity of the sand, gas in solution in the oil, *a percentage of recovery factor*, and prices for oil and gas, these calculations eventuating in a dollar value per acre foot of pay sands in the tract. For each tract Rogers multiplied acre feet of pay sand by value per acre foot—both

figures having come from Gulf's POP data—producing a dollar valuation of the pay sand in the tract. Then he cumulated the valuations for the tracts in the unit, producing what he identified as the total valuation of recoverable oil and gas in the entire unit. He calculated 1/32 of this amount, producing a value of $953,000. From this he deducted the amount plaintiffs previously had received and a projection of the amount they would receive in the future (based upon Gulf's records showing oil reserves left in the ground). The final figure thus produced was $531,752, described as the value of plaintiffs' share of recoverable oil and gas, less amounts previously paid to the plaintiffs and amounts that would be paid to them in the future.[4] Rogers' compilations of Gulf's figures and his calculations based thereon were reduced to written tabular form and introduced as an exhibit.

Gulf made no objection to introduction of Rogers' calculations and did not cross-examine him. No contention was made then or is made now that Rogers erroneously compiled Gulf's figures or erred mechanically in his calculations based thereon. On appeal, though seeking support from the broad range of discretion accorded trial judges in ruling on motions for new trial, Gulf's position with respect to this primary method of calculation is, necessarily, very narrow. It is that Rogers' calculations were so lacking in probative value that the court, in the exercise of its discretion, could set aside the jury's verdict, which was in an amount less than the amount calculated by Rogers. In support of this contention Gulf argues that the "percentage of recovery factor" of 40% of the

4. This method was consistent with the court's charge to the jury on the measure of damages:

> [I]f you find from a preponderance of the evidence in this case that the defendant has breached the unitization agreement in some material respect, and you further find that as a proximate result thereof the plaintiffs have been damaged you shall use as a measure of damages, if any, to be awarded the plaintiffs the difference, if any, between the total amount of royalty plaintiffs would have received under the unitization agreement if properly performed and the amount they have received and will receive in the future under said agreement as performed. . . .

oil in the ground, which figure was utilized by it in calculating the POP's, was not proved by plaintiffs to be the percentage of recovery that should have been attained in the unit by proper operations. It is clear that the 40% figure carried forward into Rogers' final figures, because it is embraced in the calculation of the value of oil that should have been produced, from which he deducted the amount actually recovered, the difference being, according to his method, the overall shortfall, of which plaintiffs were entitled to 1/32. Gulf urges that the purpose of calculating POP's is to establish relative shares in production, and that a wholly arbitrary recovery factor can be used in the calculation process, producing computed values that are not factually accurate but nevertheless establish the correct relative position of each participant in the production from the unit. The only substantial testimony concerning the recovery factor was that of Gulf's reservoir engineer for the field. He explained that the recovery factor was very difficult to estimate, varying in every oil field all over the world, that it could be as low as zero and sometimes as high as 70%, and that in early stages it was "pretty much of a quesstomate." He explained, that it is common practice to assume 20% recovery, which is about average, that Gulf had studies which said water flooding would be productive in this field, in which case the practice was to assume an additional 20% recovery. The total of 40% was assigned to every reservoir in the Soso field, although "nobody knew what we were going to get." The witness went on to say:

> It wouldn't have made any difference if they had used 1 or 10 or 40 or a hundred. Nobody's share of the total would have changed. They would all have been the same.
>
> Q Is that because you were using a common factor throughout?
>
> A Yes sir, we were using a common factor throughout, and when you do that the participation would not have changed any, regardless if you used one or forty or a hundred, it would have still been the same, no change.
>
> Q All right.
>
> A The engineers knew this, they knew they wouldn't know how much oil they were going to get out of the ground, but it was a good reasonable estimate, they applied it to every reservoir with the full knowledge that it had nothing to do with the value of what we were going to get out of the ground. It was fair because it was applied to every reservoir and to every party, so to calculate your part, it was fair, but it was no way intended, and should never be intended to even resemble the actual value which you were going to get out of the reservoir.
>
> Q As a matter of fact, Mr. Sinclair, do you know from your study of these reserve figures about actual percentages of recovery, that is, the recovery factors in the reservoir?
>
> A Yes sir, in the process of making my estimates of the ultimate oil, and by subtracting of course the cumulative from it to get reserve, it's necessary to come up with a recovery factor, and after looking at all of the data and all of these years of performance history which unfortunately, the people, at the time of putting this unit together didn't have, these recovery factors in Soso field in various oil pools are ranging from .3% to as much as 75% of the original oil in place.

What comes through from this testimony is that, while the 40% figure is not purely hypothetical, it was never intended to represent the percentage of recovery that should be obtained by a prudent operator in this field, performing his duties under the contract. But that is the purpose for which Rogers used it.

The plaintiffs suggest alternative approaches to assessment of damages that might support the verdict. There was testimony that an operator usually would have the objective of

withdrawing all recoverable oil over a 20-year period at an approximate level rate of withdrawal. Plaintiffs suggest taking the highest royalty received by them in any one year period and projecting it over the years in suit, and deducting from this total the amount they actually received. But this proceeds on the unproven assumption that the highest royalty year is the same as the annual royalty calculated on the basis of an approximate level withdrawal over 20 years. Additionally, this method, applied to the six years in suit, plus interest at 6%, does not produce damages of as much as the jury verdict.

Shortly before trial Gulf wrote down its reserves for the unit by 21,000,000 barrels. Plaintiffs suggest that this represents the amount of oil actually recoverable but not recovered by Gulf because of its breaches of contract, and attempts to compute damages therefrom. But the evidence does not support an inference that the write-down was related to Gulf's failures.

Having examined all possible ways of computing plaintiffs' damages within the liberal rules of this court that damages need not be proved with absolute accuracy, we are not able to say that the District Judge abused his discretion in holding that a new trial was warranted because the amount of damages awarded by the jury was not supported by evidence of sufficient accuracy and reliability. Since the order granting the new trial was not erroneous, the judgment for Gulf following the second trial must be, and is, affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

NO. 72-3057

D. C. Docket No. CA 4899

A. L. MASSEY, et al.,

Plaintiffs-Appellants

versus

GULF OIL CORPORATION,

Defendant-Appellee

Appeal from the United States District Court for the Southern District of Mississippi

Before THORNBERRY, GODBOLD and CLARK, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is

hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

February 17, 1975

Issued as Mandate:

APPENDIX D

UNITED STATES COURT OF APPEALS

Fifth Circuit

Edward W. Wadsworth
Clerk

Office of the
Clerk

600 Camp Street
New Orleans, La.70130

March 21, 1975

TO ALL COUNSEL OF RECORD
Re: 72-3057 MASSEY V. GULF OIL CORPORATION

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK
BY: Anne G. Parent
DEPUTY CLERK

cc: Mr. Michael R. Eubanks
Messrs. William A. McKenzi
A. Joe Fish
G. Lee Hart
Mr. Denton Gibbes, Jr.
Mr. James A. Boone
Mr. William G. Duck